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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 851

WHITELIGHT PRODUCTS DIVISION OF WHITE METAL ROLLING AND STAMPING CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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This brief is written in reply to the brief of the Solicitor General in opposition to the petition for a writ of certiorari herein.

The Facts Before this Court

The Solicitor General contends that there was no good faith doubt of the union majority by the employer. Throughout the Solicitor General's brief this assertion is supported by the constant reiteration of the purported fact that the union representative, Mr. Hugh Harley, Jr., offered to show the union authorization cards to the employer's plant-manager, Mr. Records, and despite this offer Mr. Records refused to recognize the union (see Respondent's brief pages 3, 11).

But this purported fact is specifically contradicted by the testimony of Mr. Donald Belden who was not only

the Board's star witness and the head of the hastily formed union committee but a person who had been recently discharged by the employer. Indeed, whether or not this discharge was an unfair labor practice and whether or not Mr. Belden should be reinstated with back pay were two of the major issues to be decided in the NLRB proceeding. Thus Mr. Belden had every personal and economic motive to testify against the employer. Yet Mr. Belden testified as follows:

> "Q. And what were you asking Mr. Records to do as you and your committee walked in, or was it Mr. Harley that was asking? A. Mr. Harley.
>
> Q. What did he say to him? A. He stated he was a representative of the United Electrical Workers, and he wished to bargain and that he had the majority cards and that he would like to be recognized and that he wished that Mr. Records would give him some idea when they would come to a decision and, in turn, Mr. Records told him Friday, the 19th.
>
> Q. Did he offer to show him the cards? A. I believe Mr. Records mentioned something about seeing the cards, and I think Hugh Harley said *when they were going to bargain, he could see the cards*. I am not positive." (CJA 19-20) (Italics supplied.)

Thus we cannot assume, as the Solicitor General apparently does, that Mr. Harley made an unconditional offer to show Mr. Records the cards. Instead it would appear more likely that Mr. Harley would have shown the cards to the employer only in the event that Mr. Records committed the *fait accompli* of recognizing and bargaining with the union. If nothing else, such union elusiveness about proving its alleged majority should be enough to demonstrate Mr. Records' good faith in doubting the union majority.

At other points the Solicitor General in his brief also gives a distorted version of the facts. Thus, for example,

he states as a fact that Mr. Records spied on a union meeting. (Respondent's brief p. 4) This accusation was specifically rejected by the Court of Appeals for the First Circuit in its decision herein. (See footnote 1 of that decision.)

The Basic Issue

The Solicitor General has continually avoided the issues raised by the Petition. He states that courts have frequently required employees to bargain when the union has shown it represents a majority of the employees. But here, even assuming that Mr. Harley offered to show the authorization cards to the employer, all there is to demonstrate the union majority, are authorization cards signed in a morning's "whirlwind campaign" obtained at a time when the employees were laboring under the uncertainties of the impending dislocations caused by the breakdown of the employer's press in Brooklyn. The Fifth Circuit in *NLRB* v. *Lorrorn*, 172 F. 2d 293 (5th Cir. 1949) aptly characterized just such authorization in the following language:

> "The authorizations on which the union relies did not represent the thoughtful and deliberate action of the employees but were the result of a rush act, a 'whirlwind campaign', as it is called."

Similarly, the First Circuit itself in *NLRB* v. *Hannaford Bros. Co.*, 261 F. 2d 638 (1st Cir. 1958) recognized the intrinsic unreliability of authorization cards despite the fact that as here it found unfair labor practices committed by the employer:

> "There is a vast difference between such a choice of a bargaining agent registered as a result of a secret ballot, and such a choice established by the introduction into evidence of signed cards, collected at the behest of the union organizer."

It is precisely for such reason that, as we pointed out in the Petition, Congress amended the National Labor Relations Act to exclude certifications based upon such cards.

Authorization cards are even more suspect here, where some of the employees independently changed their mind about the Union almost as soon as they had signed the cards (CJA 50, 102).

But it is on precisely such doubtful and even evanescent proof of a union majority that the Solicitor General would have the courts order an employer to bargain with a union as the representative of the majority of his employees.

Similarly, the Solicitor General would have us ignore the Amendments to the Wagner Act as in no way affecting prior practice. As pointed out in the Petition, this would mean that Congress intended that the NLRB would not be permitted to use authorization cards in determining whether or not to certify a particular union as a bargaining representative for a year but could use them as the basis of an order making such a union the collective bargaining representative "for a reasonable period". We submit that the underlying legislative motivation for the amendments to Section 9(c) was an inherent distrust of the reliability of authorization cards. This distrust applies to any attempt to use them to establish a union majority whether through Section 9(c) or Section 10(c).

The Solicitor General also would have the Court ignore *NLRB* v. *Adhesive Products Corp.*, 281 F. 2d 89 (2d Cir. 1960) and similar cases because the facts here are not as flagrant as they were in those cases. But a difference in facts cannot justify the difference in philosophy. On the one hand, the courts, in decisions like *Adhesive Products*, were concerned that the employees' wishes be taken into consideration and specifically required the Board order to be modified to allow such a result. On the other hand, the Court in the instant case has not considered the

interests of the employees but rather is mainly concerned with punishing the employer. To repeat what we said at length in the petition, this is not the function or purpose of the National Labor Relations Act. Rather its purpose is, as indicated by the *Adhesive Products* case, the protection of employees' rights including the right of the employees to choose their own collective bargaining representatives and to determine whether or not they wish to engage in collective bargaining. These fundamental rights have been ignored in the Board's decision, in order to punish the employer.

Finally, the Solicitor General would have us ignore *ILGWU v. NLRB*, 366 U. S. 731 (1961) because the union in the instant situation did in fact represent a majority. But this is begging the question. With no convincing proof of the union's majority the Board here would foist a collective bargaining representative on the employees regardless of their own desires.

CONCLUSION

For all the reasons contained herein and in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

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